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Supreme Court
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FEB 25
MICHAEL RODAK,

In the Supreme Court
of the United States

OCTOBER TERM, 1973

No. 73-1304

FLORIN DENTE,
Petitioner,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, LOCAL 90, an unincorporated labor organization,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

FLORIN DENTE,

Petitioner,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, LOCAL 90, an unincorporated labor organization,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Florin Dente prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 5, 1973, which reversed the judgment of the United States District Court for the District of Oregon entered May 22, 1972.

OPINION BELOW

The opinion and judgment of the Court of Ap-

peals, not yet officially reported, are set forth in
Appendix hereto. No opinion was rendered by
District Court for the District of Oregon. Its j
ment entered May 22, 1972 is also set forth in
Appendix.

JURISDICTION

The judgment of the Court of Appeals was ent
December 5, 1973. This petition for certiorari
filed within 90 days thereafter. This Court has j
diction to review the judgment of the Court of
peals by Writ of Certiorari under 28 U.S.C. §
(1).

QUESTIONS PRESENTED

1. May an employee sue his union under Se
301(a) of the Labor Management Relations A
1947 (29 U.S.C. § 185(a)) for breach of a duty
posed by a collective bargaining agreement to pr
his grievance promptly?

2. In processing an employee's meritorious g
ance for wrongful discharge, does a union engag
"arbitrary" conduct and breach its duty of fair
resentation, under the doctrine of *Vaca* v. *Sipes*,
U.S. 171 (1967), when it delays invoking the arb
tion procedure provided in the collective bargai
agreement for eight months, resulting in the
trator ordering reinstatement to employment,
denying the employee back pay against the empl
because of the union's delay?

STATUTORY PROVISION INVOLVED

29 U.S.C. § 185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner was employed by Permanente Steamship Co. ("Permanente") as chief mate of the PERMANENTE SILVERBOW, a bulk carriage vessel engaged in the coastwise trade. Petitioner is a member of Local 90 of the International Organization of Masters, Mates and Pilots ("Local 90"). Local 90 is a labor organization representing about 2,000 deck officers employed on some 100 American-flag vessels based at U. S. west coast ports (R. p. 80). Its headquarters are in San Francisco, and it has branches at a number of west coast ports (R. p. 35). Local 90 bargains with several employer units. The great majority of its members are employed in a bargaining unit made up of employers represented by Pacific Maritime Association, who operate about 80 vessels. Local 90 also has separate, but parallel bargaining agreements with single-ship employers, such a petitioner's employer, Permanente (R. p. 36, Tr. p. 111).

On December 18, 1969, while the PERMANE
SILVERBOW was docked at Portland, Oregon
home port, the vessel's master discharged petit
from his employment as chief mate, for the al
reason that petitioner left the vessel two hours
on December 17 without permission of the maste
p. 81). Petitioner on the day after his discharge
a written grievance for wrongful discharge wit
Portland office of Local 90, requesting reinstate
back pay, and that "this matter be taken up befor
Licensed Personnel Board for action" (R. pp. 81,

The collective bargaining agreement between
manente and Local 90 sets forth a two-step griev
procedure. If the grievance cannot be adjuste
formally at the local level, it is referred for fina
cision to a Licensed Personnel Board ("LPB")
up of employer and union members, or to arbitr
by the neutral chairman of the LPB. The agree
provides that an LPB will convene "promptly"
written notice of either the union or the employer
in the event of deadlock between the union and
employer members of the LPB, that arbitration
be held within 48 hours thereafter (R. p. 81; P.
13, p. 2). Grievances referred to LPB hearing o
bitration were handled for Local 90 through its
Francisco headquarters by its president and two
presidents who were full-time paid employees o
union (R. pp. 35-36, 38).

On the same day that petitioner filed his wr
grievance with Local 90's Portland office, its
agent there informed the San Francisco headqua

of Local 90 of petitioner's grievance, and was instructed that the grievance would be handled further through its headquarters (R. pp. 81-82). Permanente's headquarters are in Oakland, California. Local 90's Portland port agent nevertheless wrote a letter on December 23, 1969, to Permanente's operations manager, Mr. Nicol, enclosing petitioner's written grievance "for review and consideration as per current Agreement between the Organization and the Company." The letter requested Permanente to acknowledge receipt of the letter and "your intended disposition of this grievance" (R. p. 82; P. Ex. 2). There was no response to this letter. In January, 1970, the membership of Local 90's Portland branch formally sent the grievance of petitioner to San Francisco for LPB hearing, and the executivee vice president of Local 90 at San Francisco requested and received in that month authority from its headquarters membership at San Francisco to pursue the grievance before an LPB (R. pp. 82, 83).

Local 90 took no further action on petitioner's grievance until some eight months later in August, 1970, other than some oral conversations between its executive vice president and the master of the PERMANENTE SILVERBOW, who had discharged petitioner (R. p. 82). Throughout this period, petitioner made repeated requests to Local 90 that action be taken to bring his grievance before an LPB (R. p. 82).

Petitioner finally retained legal counsel, who sent

a letter to Local 90 in late August, 1970, threatening legal action against Local 90 if the grievance were not brought immediately to LPB or arbitration (R. pp. 82-83). This letter was received by Local 90 on or about August 25, 1970, and legal counsel retained by Local 90 immediately moved to arrange for arbitration of petitioner's grievance in September, 1970 (R. pp. 82-83). Local 90 and Permanente waived an LPB in order to move directly to arbitration (P. Ex. 12, p. 7).

The arbitration was held on September 16, 1970. The arbitrator found that there was no just cause for petitioner's discharge, and ordered him reinstated to his employment (P. Ex. 11). The arbitrator, however, refused to award back pay against the employer, on the ground that Local 90 was primarily responsible for the delay in bringing the grievance to arbitration (P. Ex. 11, pp. 10-11). The arbitrator further found that if Local 90 had pursued petitioner's grievance promptly, it could have been decided and petitioner reinstated on the job in January, 1970 (P. Ex. 11, p. 16). Instead, petitioner did not secure reinstatement until November 1, 1970, two days after the arbitrator's decision (R. p. 39).

Petitioner thereafter commenced this case in U. S. District Court for Oregon under Section 301(a) to recover damages against Local 90. Petitioner sought to recover as damages the amount of the compensation he would have earned as chief mate of the PERMANENTE SILVERBOW between February 1, 1970,

and October 30, 1970, less what he was able to earn on temporary port relief officer jobs. Petitioner alleged as grounds for recovery a breach by Local 90 of the collective bargaining contract provision calling for an LPB or arbitration to take place "promptly" on a request of the union for it (R. pp. 39-41).

Following a trial to the court sitting without a jury, the court entered Findings of Fact and Conclusions of Law (R. p. 80) and a Judgment (R. p. 85) for damages in the amount of $11,200.24, after reducing petitioner's claim by some $5,000.00 for partial failure to mitigate his damages.

The District Court's decision sustained petitioner's claim that Local 90's delay in processing the grievance violated its duties to petitioner under the terms of the collective bargaining agreement (R. pp. 83-84). The District Court also sustained recovery by petitioner on findings that Local 90 had processed petitioner's grievance "in an arbitrary, unreasonable and discriminatory manner" (R. pp. 83-84), thereby invoking the doctrine of *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The latter ground had not been urged by petitioner in the District Court (Tr. pp. 168-171), but was urged by petitioner in the Court of Appeals in support of the District Court's decision.

The Court of Appeals reversed the decision of the District Court. The breach of contract ground for the District Court's decision was rejected by the majority opinion of the Court of Appeals in a footnote:

> "The appellee argues that he has a separate ground for his claim against the union, based

upon the union's alleged breach of the collective bargaining agreement. That agreement provides that grievances shall be settled 'promptly.' The right of an employee to sue his union under Section 301(a) is limited to those cases wherein there has been a breach of duty of fair representation by the union. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); Note, *Individual Control over Personal Grievances under Vaca* v. *Sipes*, 77 Yale L. Rev. 559, 560 (1968). . . ." (Appendix, p. 20, infra).

As to the breach of the duty of fair representation found by the District Court, the Court of Appeals held:

> "Examining the entire record, we find no evidence that the union 'unfairly represented' Dente in a manner for which compensation is available under *Vaca* v. *Sipes*, supra. We can perceive no union conduct that was performed in bad faith or that could be characterized as arbitrary or discriminatory. 386 U.S. at 190. The worst that can be said of the union's conduct is that it was negligent, and this of course is not enough. [Footnote omitted] For whatever can be said of the union's delay in processing the grievance in moving to arbitration, it was not that kind of 'arbitrary abuse' giving rise to damages under Section 301." (Appendix, pp. 19-20, infra).

Judge Browning's concurring opinion rejected petitioner's breach of contract ground for recovery on his view that the contract only required an LPB to meet promptly, and did not impose any duty on Local 90 to present grievances promptly to an LPB or to arbitration. His concurring opinion further held that

federal law imposes no duty of fair representation on Local 90, an organinization of supervisory employees, and therefore petitioner could not sue under Section 301(a).

REASONS FOR GRANTING THE WRIT

A. Union's Breach of Contractual Duty in Handling a Grievance

The Court of Appeals majority opinion holds that an employee may not sue his union bargaining representative under Section 301(a) for breach of a duty set forth in the collective bargaining agreement to process his grievance promptly, unless the union's conduct also amounts to a breach of the fair representation duty set forth in *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

Petitioner submits that the Court of Appeals' holding is an erroneous and novel interpretation of both Section 301(a) and of this Court's opinion in *Vaca* v. *Sipes*. It is clear that individual employees may sue employers under Section 301(a) for breach of a collective bargaining agreement. *Smith* v. *Evening News Association*, 371 U.S. 195 (1962). *Vaca* v. *Sipes* permitted an employee to sue his union under Section 301(a) for breach of the duty of fair representation, a duty imposed by law upon a collective bargaining agent, flowing from its status and powers as such.

There is no reason why an employee should not also be able to sue his union under Section 301(a) for breach of duty of promptness in handling grievances

imposed on the union by the terms of the collective bargaining agreement itself. This Court in *Vaca* v. *Sipes* was not faced with that question. The Court there dealt with a situation in which the union had not breached any duty imposed on the union by the collective bargaining agreement, as opposed to a duty imposed by law.

To say that an employee may sue under Section 301(a) for an employer's breach of a collective bargaining agreement, but not for a union's breach of the same agreement, is a manifestly discriminatory interpretation of Section 301(a). No requirement of "hostility" or "arbitrary" conduct, in addition to breach of the terms of a collective bargaining agreement, is required under Section 301(a) for either an employee to sue an employer or an employer to sue a union. Breach of a collective bargaining agreement in itself makes out a claim within Section 301(a).

Collective bargaining agreements rarely impose any specific duties upon the union bargaining representative in handling grievances. Where they do so, however, theres is no reason why a breach of such provisions in the contract should be treated any differently under Section 301(a) than any other breach of the contract.

B. Breach of the Duty of Fair Representation

In reversing the District Court's second ground for its decision — respondent's breach of its duty of fair representation in handling petitioner's grievance

— the Court of Appeals adopts an erroneously narrow interpretation of *Vaca* v. *Sipes*, which is in conflict both with its own earlier opinion in *Retana* v. *Local 14, Elevator Operators*, 453 F.2d 1018 (C.A. 9, 1972), and with recent decisions of the Fourth and Sixth Circuits. *Griffin* v. *United Auto Workers*, 469 F.2d 181 (C.A. 4, 1972); *Day* v. *United Auto Workers*, 466 F.2d 83 (C.A. 6, 1972).

As this Court recognized in *Vaca* v. *Sipes*, a union breaches its fair representation duty in processing a grievance when its conduct is "arbitrary, discriminatory or in bad faith" (386 U.S. at 190, 193-194), or if it handles the grievance in a "perfunctory" fashion (386 U.S. at 191, 194). Recent Court of Appeals' decisions have begun to recognize that a union can breach its fair representation duty by "arbitrary" conduct, which is not hostile, discriminatory or in bad faith. See also Judge Browning's concurring opinion in this case, Appendix, page 20.

In *Griffin* v. *United Auto Workers*, supra, recovery for breach of the duty of fair representation was sustained on evidence showing the union's arbitrary or perfunctory handling of a wrongful discharge grievance by initiating it with the very foreman of the employer who had procured the plaintiff's discharge. In *Day* v. *United Auto Workers*, supra, the court held that the union breached the duty of fair representation by failing to pass on to the plaintiff a notice it received that plaintiff had been discharged from employment while on leave, and by filing an untimely grievance and then withdrawing it, all without

notice to plaintiff, which had the effect of depriving the plaintiff the right to use the grievance procedure. Similarly, the Court of Appeals for the Ninth Circuit in *Retana* v. *Elevator Operators*, supra, held that a union's failure to advise Spanish-speaking employees of their rights under the collective bargaining agreement and to take other affirmative action to overcome the obstacles of a language barrier deprived plaintiffs of participation in the benefits of collective bargaining, and constituted a breach of the duty of fair representation.

In all three of these cases, union conduct short of intentional hostility, discrimination or bad faith was nevertheless held to be a breach of the duty of fair representation because it was an unreasonable, arbitrary and perfunctory performance of the duties of a collective bargaining representative, resulting in aggrieved employees being deprived of their collective bargaining remedies against the employer.

In the present case, the record also discloses evidence sufficent to sustain the District Court's finding and conclusion that Local 90 handled petitioner's wrongful discharge grievance in an arbitrary, unreasonable and perfunctory manner, thus violating the duty of fair representation and depriving petitioner of the back pay remedy otherwise available to him through the grievance procedure. This evidence included the following:

1. Local 90 completely failed to do anything to bring petitioner's grievance to LPB hearing or arbi

tration for eight months after its initial letter to Permanente on December 23, 1969. Local 90 was moved to act on the grievance only by petitioner hiring legal counsel who threatened legal action if the grievance were not immediately brought to LPB hearing or arbitration. Following receipt of this letter, Local 90 took immediate steps to arrange arbitration of the grievance (R. pp. 82-83).

2. Local 90's only action on petitioner's grievance during the eight-month delay was its executive vice president's discussion of the grievance on a few occasions with Permanente's vessel master who had fired petitioner, whereas Local 90 had earlier initiated the grievance by contacting the master's superior, Mr. Nicol (R. p. 82). The executive vice president of Local 90 claimed in his testimony that he could not reach Mr. Nicol in this eight-month period to discuss petitioner's grievance, although he was able to reach him to discuss other matters in the same period (Tr. p. 130). Compare the facts in *Griffin* v. *United Auto Workers*, supra.

3. Although the collective bargaining agreement provided for a panel of alternate arbitrators, in case the permanent arbitrator was unavailable, Local 90 relied on the unavailability of the permanent arbitrator as justification for the delay (Tr. pp. 120-122), and failed to call in an alternate arbitrator until after petitioner's legal counsel threatened legal action against Local 90 if the grievance were not immediately brought to LPB hearing or arbitration (R. pp. 82-83).

4. In the arbitration proceeding, counsel supplied by Local 90 to represent petitioner completely failed to offer to the arbitrator the list of justifications for its delay offered at the trial in the District Court (compare P. Ex. 12, pp. 51, 162, with Tr. pp. 106 et seq. and D. Ex. 106), even though the employer repeatedly argued in the arbitration proceedings that it should not be held responsible for back pay by reason of the union's delay in processing the grievance (P. Ex. 12, pp. 44-46, 48, 156).

5. Local 90 failed to notify petitioner of either the fact that there would be a long and indefinite delay in processing his grievance or of the many reasons for the delay claimed by Local 90's testimony in this case, despite repeated inquiries and requests for quick action by petitioner (R. p. 82; Tr. pp. 26-29; P. Ex. 6). Compare the facts in *Retana* v. *Elevator Operators*, supra.

6. When Local 90 finally got around to processing accumulated grievances, it first arranged to bring 29 grievances against PMA employers to LPB hearing or arbitration (of which two were for wrongful discharge) in July and early August, 1970. It failed, however, to schedule any such hearing for petitioner's grievance until threatened with legal action (Tr. 133-135; P. Ex. 18, 18A).*

* One of the two wrongful discharge grievances against PMA employers was that of Mr. Bouthillier, who had been discharged at Portland on December 15, 1969, three days before petitioner's discharge. Local 90 secured a settlement of Mr. Bouthillier's wrongful discharge grievance which included both reinstatement and back pay (P. Ex. 18, Item 27).

7. Local 90 failed to assign sufficient manpower to handle grievances in a timely fashion. President Durkin, Executive Vice President Larson and First Vice President Tuttle were charged by Local 90 with the duty of processing grievances to LPB hearing or arbitration (R. p. 38). President Durkin suffered from alcoholism and was hospitalized twice for this condiiton during the pendency of petitioner's grievance (Tr. p. 156; P. Ex. 24), and took unrecorded "vacations" and could not be located other times (Tr. pp. 155-156). Executive Vice President Larson was seriously ill and on vacation for substantial periods while petitioner's grievance was pending (Tr. p. 153). First Vice President Tuttle did not commence his employment by Local 90 until March, 1970 (R. p. 36). No other staff members of Local 90 were assigned to process grievances to LPB hearing or arbitration while these officers were absent or unavailable to perform their duties.

Petitioner submits that the foregoing evidence sustained the District Court's finding and conclusion that Local 90 breached its duty of fair representation by handling petitioner's wrongful discharge grievance in an arbitrary and perfunctory manner. If the Court of Appeals' reversal of the District Court's decision on this point is allowed to stand, the scope of the protection to employees afforded by this Court's decision in *Vaca* v. *Sipes* will be severely and unreasonably narrowed.

CONCLUSION

Petitioner requests that the Writ of Certiorari granted.

Respectfully submitted,

CARL R. NEIL
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DAFOE & KRAUSE
Counsel for Petitioner

February 21, 1974

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLORIN DENTE, *Appellee*,	)	
vs.	)	No. 72-2499
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, Local 90, an unincorporated labor organization, *Appellant.*	)	OPINION

[December 5, 1973]

On Appeal from the United States District Court for the District of Oregon

Before: CHAMBERS, BROWNING, and ELY, Circuit Judges.

ELY, Circuit Judge:

Florin Dente, a member of Local 90 of the International Organization of Masters, Mates and Pilots (hereinafter "MMP"), filed a grievance with the Local in December, 1969, against his employer for wrongful discharge. Since the Local was involved in contract renegotiations, this grievance, as well as any others, was not arbitrated until September, 1970. At that time, Dente was reinstated but the arbitrator declined to award back pay.

Dente then initiated this damage action against his union, asserting that the delay between his grievance and the arbitration effectively deprived him of wages during the intervening period. The District Court held that under section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), *as construed, Vaca* v. *Sipes*, 386 U.S. 171 (1967), the union was liable to Dente for damages arising out of the delay in arbitration.

The threshold question is whether jurisdiction here exists under section 301(a), which vests jurisdiction in district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ."

Appellant contends that since MMP represents only "supervisory" employees, and since section 501 (3)[1] of the Labor-Management Relations Act, 29 U.S.C. § 142(3), and section 2(3)[2] of the National Labor Relations Act, as amended, 29 U.S.C. § 152(3), operate to exclude MMP from definition as a "labor organization *representing employees*" (emphasis added), jurisdiction cannot be predicated upon section 301(a). This rather mechanical approach to the statutory interpretation has found some judicial adherents. *See Masters, Mates & Pilots Union* v. *NLRB*, 351 F.2d 771 (D.C. Cir. 1965); *Pharmacists, Local 330* v. *Lake*

[1] "The term 'employee' . . . shall not include . . . any individual employed as a supervisor. . . ."

[2] "'(E)mployee' . . shall have the same meaning as when used in subchapter II of this chapter (the original National Labor Relations Act) as amended by this chapter."

Hills Drug Co., 255 F. Supp. 873 (W.D. Wash. 1964) (dictum). We, however, agree with the Second Circuit that Congress, by eliminating supervisory employees from the bargaining and organizational protection of subchapter II, did not intend to deprive members of "supervisory unions" of the rights secured by section 301. *E.g.*, *National Marine Eng'rs Beneficial Ass'n* v. *Globe Seaways, Inc.*, 451 F.2d 1159, 1160, n. 1 (2d Cir. 1971); *United States* v. *National Marine Eng'rs Beneficial Ass'n*, 294 F.2d 385 (2d Cir. 1961); *Isbrandtsen Co.* v. *District 2, Marine Eng'rs Beneficial Ass'n*, 256 F. Supp. 68 (E.D. N.Y 1966); *see United States* v. *National Marine Eng'rs Beneficial Ass'n*, 292 F.2d 190, 192 (2d Cir. 1961). We thus conclude that the complaint stated a claim within the District Court's jurisdiction.

The above notwithstanding, the decision below cannot stand. Examining the entire record, we find no evidence that the union "unfairly represented" Dente in a manner for which compensation is available under *Vaca* v. *Sipes*, *supra*. We can perceive no union conduct that was performed in bad faith or that could be characterized as arbitrary or discriminatory. 386 U.S. at 190. The worst that can be said of the union's conduct is that it was negligent, and this of course is not enough.[3] For whatever can be said of the union's

[3] This, in effect, was the holding in *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967), and the Supreme Court upheld that construction of *Vaca* in a later case, *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). There the Court, citing *Vaca*, again found that "arbitrary or bad-faith conduct on the part of the Union" must be proved, and further held there must be "substantial evidence of fraud, deceitful action

delay in processing the grievance and moving to arbitration, it was not that kind of "arbitrary abuse" giving rise to damages under section 301.[4] *Id.* at 193.

The judgment is reversed and, upon remand, the complaint will be dismissed.

Reversed and remanded, with directions.

BROWNING, Circuit Judge, concurring in the result:

It is unnecessary to decide whether section 301(a) extends to suits for violation of a contract between an employer and an organization representing supervisory personnel, a problem more difficult for me than the opinion of the court would suggest. It is also unnecessary to decide the extent to which the statutory duty of fair representation bars conduct that might be characterized as negligent in traditional tort law; certainly the duty may be breached by conduct neither

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or dishonest conduct." *Id.* at 299. Certainly, "fraud, deceitful action or dishonest conduct" cannot be equated with any concept of mere negligence.

[4] The appellee argues that he has a separate ground for his claim against the union, based upon the union's alleged breach of the collective bargaining agreement. That agreement provides that grievances shall be settled "promptly." The right of an employee to sue his union under section 301(a) is limited to those cases wherein there has been a breach of duty of fair representation by the union. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); Note, *Individual Control Over Personal Grievances Under Vaca* v. *Sipes*, 77 Yale L. Rev. 559, 560 (1968). Collective bargaining agreements are unique in nature, and the current limitations on the employee's right to sue under section 301(a) are not so restrictive as substantially to impair his protective remedies. *See* Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1004-1005 (1955); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Blumrosen, *Legal Protection For Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 Rutgers L. Rev. 631, 653-57 (1959).

hostile nor malicious. *Vaca* v. *Sipes*, 386 U.S. 171, 191 (1967); *Retana* v. *Local 14, Elevator Operators*, 453 F.2d 1018, 1023 n. 8, 1024 n. 10 (9th Cir. 1972). The judgment should be reversed, but upon other grounds.

1. There was no breach of a federal duty of fair representation. This federal duty is a concomitant of the right of exclusive representation conferred by section 9(a) of the National Labor Relations Act; no other source of the duty has been suggested. *See, e.g., Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Vaca* v. *Sipes, supra*, 386 U.S. at 177; *Retana* v. *Local 14, Elevator Operators, supra*, 453 F.2d at 1021-22; *Richardson* v. *Communications Workers of America*, 443 F.2d 974, 980 (8th Cir. 1971). But the appellant union was not granted exclusive bargaining power by section 9(a). Section 9(a) grants such power only to "representatives designated or selected for the purposes of collective bargaining by the majority of *employees*" (emphasis added). The members of appellant union are not "employees" for the purposes of section 9(a); they are all supervisors. *Cf. Hanna Mining Co.* v. *MEBA*, 382 U.S. 181, 188-89 (1965). Since no duty of fair representation is imposed upon appellant union by federal law, any duty with regard to representation owed to appellee by appellant union must be based upon state law and, absent an independent ground for federal jurisdiction, could be enforced only in state courts.

2. Even if a federal action would be maintainable

against appellant union under section 301(a) for simple breach of the collective bargaining agreement, as distinguished from a breach of a federal duty of fair representation, no such breach was shown. The collective bargaining agreement only required the Licensed Personnel Board to meet promptly to consider grievances; no provision of the agreement imposed a duty upon the union to present grievances promptly to the Board.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLORIN DENTE, *Appellee,* vs. INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, Local 90, an unincorporated labor organization, *Appellant.*	No. 72-2499 (D. C. # 71-3)

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded, with directions. With costs in this court in favor of the appellant and against the appellee.

COSTS:

Docket fee	$ 25.00
Appellant brief	649.88
	$674.88

Filed and entered December 5, 1973.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF OREGON

FLORIN DENTE,	)	
vs.	)	Civil Action
INTERNATIONAL ORGANIZATION OF	)	File No. 71-
MASTERS, MATES AND PILOTS,	)	
Local 90, an unincorporated	)	JUDGMENT
labor organization,	)	

This action came on for trial (hearing) bef
the Court, Honorable Robert C. Belloni, United Sta
District Judge, presiding, and the issues having b
duly tried (heard) and a decision having been d
rendered,

It is Ordered and Adjudged that the plain
Florin Dente recover of the defendant Internatio
Organization of Masters, Mates and Pilots, Local
the sum of $11,200.24.

Dated at Portland, Oregon, this 22nd day of M
1972.

/s/ *Robert M. Christ*
Clerk of Court

FILE COPY

MAY 8

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1304

FLORIN DENTE,

Petitioner,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, LOCAL 90, an unincorporated labor organization,

Respondent.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF AUTHORITIES

Cases

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1304

FLORIN DENTE,

Petitioner,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, LOCAL 90, an unincorporated labor organization,

Respondent.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent, LOCAL 90 of the INTERNATIONAL ORGANIZATION OF MATES AND PILOTS (herein the Union), opposes the granting of the Petition for Certiorari in this case.

OPINION BELOW

The opinion below is reported at 492 F.2d (Adv.) 10.

QUESTIONS PRESENTED

In respondent's view, the questions presented are the following:

1. Is a union which represents only supervisory employees a "labor organization representing employees" within the meaning of Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185a)?

2. Does such a union, which has no statutory right of exclusive representation, owe a federal duty of fair representation?

3. May an employee sue his union under Section 301(a) for asserted breach of the procedural provisions of a collective bargaining agreement?

4. Does such a union breach a federal duty of fair representation because of its good faith delay in processing an individual grievance to arbitration, giving priority to collective bargaining negotiations and other problems affecting the majority of the union's members?

5. Absent breach of a duty of fair representation, is arbitration under the contract the exclusive remedy for an alleged violation of the contract, and is the arbitrator's award denying back pay final and binding on the employee as the contract provides?

STATEMENT OF THE CASE

Petitioner's statement is essentially correct except for the following:

1. The collective bargaining agreement (Record p. 81; plaintiff's Exhibit 13, p. 2) imposes no obligation upon the Union to process a grievance promptly. A review of the provisions discloses that the contract contains only an agreed-upon procedure for the handling of grievances and does not purport to require the Union to process a grievance promptly. The provision relied on by petitioner reads as follows:

Section III, paragraph 6:

> "6. Unless some other place is mutually agreed upon, the Board shall meet in San Francisco promptly upon written notice from either the Organization or the Employers."

2. Petitioner's statement does not point out the reasons why the Union delayed processing not only petitioner's grievance but all grievances pending completion of long

and involved collective bargaining negotiations. Respondent printed in its Brief to the Court of Appeals Defendants' Exhibit 106, a chronology describing the multitudinous problems facing the Union during the period petitioner's grievance was held in abeyance. A copy of that summary is attached to this Response as an appendix.

3. Petitioner's statement glosses over the reasons why the arbitrator denied back pay.

The arbitrator denied back pay for several reasons. (R. 20-21). He found that the petitioner had committed an offense (leaving work early) for which discipline short of discharge was justified. He found that the petitioner had not minimized his damage by taking other available employment. He found also that although the employer was guilty of delay in handling the grievance, the petitioner's Union was primarily responsible for the delay.

ARGUMENT

There are many reasons why the District Court's decision was incorrect and the Court of Appeals' reversal was correct. None of these issues are of such nature or importance as to require consideration by this Court.

I

The primary basis asserted for jurisdiction below is Section 301(a) quoted on page 3 of the Petition. The difficulty with this argument is that the Union represents only supervisory employees and it is therefore not a "labor organization representing employees" within the meaning of Section 301(a). This contention is summarized and rejected in the following quotation from the majority opinion of the Court of Appeals (492 F.2d (Adv.) pages 11, 12.):

"The threshold question is whether jurisdiction here exists under section 301(a), which vests jurisdiction in district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ."

Appellant contends that since MMP represents only "supervisory" employees, and since section 501(3)[1] of the Labor-Management Relations Act, 29 U.S.C. § 142(3), and section 2(3)[2] of the National Labor Relations Act, as amended, 29 U.S.C. § 152(3), operate to exclude MMP from definition as a "labor organization *representing employees*" (emphasis added), jurisdiction cannot be predicated upon section 301(a). This rather mechanical approach to the statutory interpretation has found some judicial adherents. *See Masters, Mates & Pilots Union v. NLRB*, 351 F.2d 771 (D.C. Cir. 1965); *Pharmacists, Local 330 v. Lake Hills Drug Co.*, 255 F. Supp. 873 (W.D. Wash. 1964) (dictum). We, however, agree with the Second Circuit that Congress, by eliminating supervisory employees from the bargaining and organizational protection of subchapter II, did not intend to deprive members of "supervisory unions" of the rights secured by section 301. *E.g., National Marine Eng'rs Beneficial Ass'n v. Globe Seaways, Inc.*, 451 F.2d 1159, 1160, n. 1 (2d Cir. 1971); *United States v. National Marine Engr's Beneficial Ass'n*, 294 F.2d 385 (2d Cir. 1961); *Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 256 F. Supp. 68 (E.D. N.Y. 1966); *see United States v. National Marine Eng'rs Beneficial Ass'n*, 292 F.2d 190, 192 (2d Cir. 1961). We thus conclude that the complaint stated a claim within the District Court's jurisdiction."

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1. "The term 'employee'. . . shall not include . . . any individual employed as a supervisor. . . ."

2. "'(E)mployee'. . . shall have the same meaning as when used in subchapter II of this chapter (the original National Labor Relations Act) as amended by this chapter."

II

Even assuming that the District Court had jurisdiction, petitioner's novel theory that the Union violated the procedural provisions of the collective bargaining contract finds no factual support in the collective bargaining contract itself. The agreement simply provides a procedure for handling of grievances and places no burden on either the employer or the Union. The paragraph of the contract relied upon is quoted at page 2, *supra*.

III

If the Court were to consider the merits of petitioner's argument that the procedural provisions of the contract relating to grievance handling established a duty by the Union to process his grievance promptly, he faces a still further problem.

This Court has ruled that interpretation of the procedural provisions of a collective bargaining contract is for the arbitrator, not for the courts. *Wiley and Sons v. Livingston*, (1964) 376 U.S. 543 (see particularly footnote 12). *Operating Engineers Local 250 v. Flair Builders*, (1972) 406 U.S. 487. As this Court said in *Wiley, supra*, at page 558:

> "... Reservation of 'procedural' issues for courts would thus not only create the difficult task of separating related issues, but would also produce frequent duplication of effort."

IV

The arbitrator could have awarded back pay but chose not to do so; his determination is final and binding. Having litigated his claim for back pay before the arbitrator, petitioner cannot litigate his claim for back pay in court.

The remedy, if any, for the procedural delay raises an issue which should be and was decided by the arbitrator. *Humphrey v. Moore,* (1964) 375 U.S. 335, 351.

> ". . . The decision of the committee reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. Drivers Union v. Riss & Co., 372 U.S. 517."

Compare also *Andrews v. Louisville and Nashville Railway Co.,* (1972) 406 U.S. 320 at page 325.

Where, as here, the grievance was arbitrated by the Union vigorously and fairly, the decision of the arbitrator must be final and binding, as the collective bargaining contract requires. The finality of the arbitrator's decision may be questioned only in cases where the union violates a duty of fair representation.

V

In *Vaca v. Sipes,* (1967) 386 U.S. 171, although the Court premises jurisdiction upon Section 301(a), the Court's analysis (386 U.S. at page 182) discloses that the real basis of jurisdiction in a suit against the Union was the right accorded to the Union under Federal law as the exclusive bargaining representative which gave rise to a statutory duty of fair representation. The duty of fair representation of unions subject to the Railway Labor Act, likewise finds its genesis in the Federal statute conferring bargaining rights on the union. For the reasons pointed out by Judge Browning in the following language in his concurring opinion the Union here, having no exclusive bargaining power granted to it under any Federal statute owed no statutory duty of fair representation (492 F.2d (Adv.) page 13.):

> "There was no breach of a federal duty of fair representation. This federal duty is a concomitant of t

right of exclusive representation conferred by section 9(a) of the National Labor Relations Act; no other source of the duty has been suggested. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *Vaca v. Sipes, supra*, 386 U.S. at 177; *Retana v. Local 14, Elevator Operators, supra*, 453 F.2d at 1021-22; *Richardson v. Communications Workers of America*, 443 F.2d 974, 980 (8th Cir. 1971). But the appellant union was not granted exclusive bargaining power by section 9(a). Section 9(a) grants such power only to "representatives designated or selected for the purposes of collective bargaining by the majority of *employees*" (emphasis added). The members of appellant union are not "employees" for the purposes of section 9(a); they are all supervisors. *Cf. Hanna Mining Co. v. MEBA*, 382 U.S. 181, 188-89 (1965). Since no duty of fair representation is imposed upon appellant union by federal law, any duty with regard to representation owed to appellee by appellant union must be based upon state law and, absent an independent ground for federal jurisdiction, could be enforced only in state courts."

VI

The Court of Appeals determined that the Union's good faith delay in processing petitioner's grievance did not violate its duty of fair representation. This determination is in accordance with the decisions of this Court in *Vaca v. Sipes* (1967) 386 U.S. 171; and *Motor Coach Employees v. Lockridge*, (1971) 403 U.S. 274.

We are not here concerned with cases (such as *Vaca v. Sipes, supra*) in which a union fails or refuses to process a grievance or handles a grievance in a perfunctory manner, or delays handling the grievance for no valid reason. Here the delay in arbitration was compelled by circumstances (Appendix, infra). The delay was in recognition of the

necessity for an accomodation of all the Union's respon
bilities to all of its members. The good faith assignme
of priority to the negotiation of collective bargaini
contracts over the handling of grievances was well with
the permissible limits of union discretion under the decisio
of this Court. *Ford Motor Co. v. Huffman,* (1953) 345 U.
330; *Humphrey v. Moore,* (1964) 375 U.S. 335.

The Union had delayed processing all contractual gri
ances, primarily because of lengthy and protracted ne
tiations for new collective bargaining contracts. The Co
of Appeals correctly stated (492 F.2nd (Adv) page 11

> "Since the Local was involved in contract renegot
> tions, this grievance, as well as any others, was
> arbitrated until September, 1970. At that time, De
> was reinstated but the arbitrator declined to awa
> back pay".

There is neither evidence nor pleading of any unf
representation of petitioner, nor hostility toward him
even any contention of lack of good faith on the part of
union. The Union paid the costs of arbitration, includi
the arbitrator, the reporter and the attorney. (R.Tr. 67
and 123). Petitioner was offered the opportunity to h
his own counsel represent him but chose to be represen
by counsel paid by the Union. Petitioner conceded (P
tion for Certiorari, p.7, lines 22 et seq.), that this b
for liability had not been urged to the District Court. I
conceded that counsel selected by the Union did an ex
lent job in presenting the discharged employee's grieva
(Defendant's Ex. 104; Tr. 72).

The mischief which would be done if losing grieva
were permitted to sue their Union for lost pay in ev
case in which back pay is denied by an arbitrator in a
charge case is incalculable. In a great many cases, a

trators award reinstatement with only some or no back pay and necessarily in every case some time interval elapses between the grievant's discharge and the date of the arbitrator's decision. If a court were required to determine in every individual case whether or not the union, although acting in good faith, was somehow at fault in failing to secure earlier reinstatement, problems similar to those which this Court described in its decision in *Vaca v. Sipes*, (1967) 396 U.S. 171, 191, 192, would be presented.

This case raises a multitude of issues, none of which need to be re-determined by this Court.

This Court has delineated the applicable rules for the finality of labor arbitration decisions and this Court likewise has defined the circumstances when a union's actions in an arbitration proceeding may be challenged in Court. The decision below is in accord with the decisions of this Court. The three cases relied upon by petitioner on pages 11 through 13 of its petition appear to misinterpret *Vaca v. Sipes*, and in any event involve circumstances in which an inference of bad faith conduct might be drawn. In the present proceeding there is no claim of bad faith nor any basis for any inference of bad faith.

It is respectfully submitted insufficient reason is shown for the granting of certiorari.

Dated: May 7, 1974

JOHN PAUL JENNINGS
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Attorneys for Respondent Union

(Appendix Follows)

Appendix

Chronology for Use by Captain Larson

I

Negotiations With PMA

1970	
Jan. 6-8	Coastwise Negotiation Committee—S.F. Committee reviewed PMA 10/23 and 11/6/69 which was full Agreement draft and Costing (85 pages) and re-drafted Section XXX—Jurisdiction language.
Jan. 9	Meeting with Pacific Maritime Association. Organization protested PMA's 12/18/69 letter as being unwarranted interference in Organization's affairs.
Jan. 13	Meeting with Pacific Maritime Association Full day's discussion between parties re Cost Package and Jurisdiction.
Jan. 15 to Feb. 15	MMP working at sub-committee level on MMP/PMA drafts and comparing areas of agreement and disagreement. Dr. Gallardo assisting in economics.
Feb. 16	Coastwise Negotiating Committee Meeting—S.F. Parties meeting on total Agreement. Some concessions by both parties.
Feb. 17 & 18	As before
Feb. 19 & 20	Parties resumed discussion Section XXX and Pilotage language.
Feb. 20-24	Coastwise Negotiation Committee meeting with PMA. MMP sub-committee drafting and voting on Majority and Minority Reports for presentation to Membership Meeting.
Mar. 2	Coastwise Negotiating Committee Meeting—S.F. MMP continues re-drafting language.
Mar. 3	Coastwise Negotiating Committee with PMA. Parties discuss Welfare benefits.
Mar. 4-10	Negotiating Sub-Committee Meetings with PMA. Sub-Committee members meet with PMA on areas of disagreement.
Mar. 16	Coastwise Negotiating Committee meeting—S.F. MMP continues language drafting.
Mar. 17, 18, 20	Coastwise Negotiating Committee Meeting with PMA. Continued negotiating with PMA in areas of disagreement.
Mar. 21	Coastwise Negotiating Committee Meeting—S.F. MMP resumed discussion of revised language.
Mar. 23	MMP continues as before.

Mar. 24	Coastwise Negotiating Committee Meeting with I Resume with PMA in areas of disagreement.
Mar. 25, 26, 27	MMP Sub-Committee discussions.
Mar. 30, 31	Coastwise Negotiating Committee meeting—S.F sumed with PMA on unresolved items.
Apr. 1, 2, 3	Coastwise Negotiating Committee meeting—S.F. continues re-draft.
Apr. 6 thru 13	Sub-Committee MMP continues negotiations PMA.
Apr. 14	Negotiating Sub-Committee—Captains Durkin Caldwell meeting with PMA.
April 16	Coastwise Negotiating Committee meeting. MM agrees by 5-4 vote to convene Postal Ballot mittee on 4/20 to prepare for ratification vote.
Apr. 17-18	Negotiating Sub-Committee meeting with PMA on Apr. 18, proceeding to Captain Larson's ho his signature on Agreement.
Apr. 20	Captain Tuttle convenes Postal Ballot Committ Ratification.
May 4, 5	Mr. Crooks and Captain Larson to PMA re I
May 6, 7, 8, & 11	Captain Larson to PMA re Agreement example
May 18-29	Hendy Tanker Negotiating Committee—S.F.
June 3, 4, 5	Hendy Tanker Negotiating Committee—S.F.
June 5	Ballot Committee (Patrolman)
June 29	Captain Durkin meets with E. Flynn, PMA, tributions.
June 30	Captain Larson to California Maritime Acaden
July 1	Captains Durkin and Larson meet with PMA.
July 3 & 9-13	Captain Durkin in L.A., meeting Hendy Intern Co.
July 13-22	Murphy-Pacific Negotiations.
July 17	Asst. Treasurer-Bookeeper left.
July 21-24	Auditors in office to assist and check records.
July 23-25	Meeting with Hendy International Co. in L.A.
July 29	Hendy Tanker Negotiating Committee meetin
July 30, 31 & Aug. 4 & 5	Licensed Personnel Board meeting—29 items.
Aug. 4-8	Hendy Negotiations meeting in L.A.
Aug. 10	Hendy Negotiations meeting—S.F.
Aug. 27-31	Hendy Negotiations meeting—S.F.—CRITICA
Sept. 1	Hendy Negotiations meeting with John P. Je
Sept. 3, 9, 11	Hendy Negotiations meeting—S.F.

II

Pension Plan Dispute

1. Dispute initiated in April by PMA's unilateral change of the contribution rate from $16.03 down to $12.39.

2. Dispute involved Union-PMA actuaries.

3. Membership vote up and down the coast to invoke No-sign-on policy August 26, 1970. No-sign-on policy in effect Sept. 22.

4. September 23rd, A.M.—struck Hendy.

5. September 24-September 25 dispute settled by payment of approximately $500,000.00 by PMA companies.

III

Implementation of PMA contract. Working out details for putting contract monetary clauses into effect.

IV

7. *MMP/PMA Trustees' Meetings:*
   March 19, 1970
   June 17, 1970
   June 18, 1970
   June 25, 1970—East Coast-West Coast Trustees meeting
   Dec. 11, 1969

V

Union Meetings

Dec. 15-20, 1969	International Executive Committee meeting—Brownsville, Texas.
Dec. 29-30, 1969	Local 90 Executive Committee meeting.
1970	
Jan. 5	Postal Ballot Committee S.F.—Patrolman's Election.
Jan. 14	Membership meeting—S.F.
Jan. 19-23	Meeting of Special Constitutional Committee—New Orleans.
Jan. 26-31	Constitutional Convention—New Orleans.
Feb. 1-6	Constitutional Convention—New Orleans.
Feb. 24	Meeting of Shareholder Trustees of MMP Bldg. Assn.
Feb. 25	Membership meeting—S.F.
March 21	Membership meeting.
April 8	Membership Meeting S.F.
April 20	Postal Ballot Committee meeting—S.F.—Ratification.
April 22	Membership Meeting S.F.
May 13	Membership Meeting S.F.
May 18	Postal Ballot Committee meeting—S.F.—Ratification.

June 3	Postal Ballot Committee meeting—S.F. Patrolman.
June 19	Local 90 Executive Committee meeting.
June 22	Permanent International Finance Committee —S.F.
June 23-25	International Executive Committee meeting-
June 24	Certification of Consolidation received, with at problems.
June 24	Membership Meeting—S.F.
June 26	Captains O'Callaghan, Larson and Mr.Crooks —S.F.
July 22	Membership Meeting—S.F.
Aug. 12 & 26	Membership Meeting—S.F.
Sept. 10	Membership Meeting—S.F.

Notes

August, 1969 — Helen Durkin death.

O. Larson ill—out of office March and April and August 8 thru Sept. 7 1970, ill.

G. Tuttle at sea until March; employed March 12, 1970 thru Sept. 11,